



Staff Summary Report

Council Meeting Date: 02/07/08

Agenda Item Number: _____

SUBJECT: Request Council approval authorizing the Mayor to execute an Agreement between the City of Tempe and Salt River Project Agricultural Improvement and Power District (“SRP”) for consent to encroach upon a power-line easement for the purpose of erecting a fence.

DOCUMENT NAME: 20080207ITDH1 UTILITY EASEMENTS GRANTED (0904-02)

SUPPORTING DOCS: NO

COMMENTS: N/A

PREPARED BY: DAVE HECK, DEPUTY IT MANAGER (x8777)

REVIEWED BY: GENE OBIS, IT MANAGER (x8353)

LEGAL REVIEW: JENAE NAUMANN, ASSISTANT CITY ATTORNEY (x8402)

FISCAL NOTE: N/A

RECOMMENDATION: That the Council authorizes the Mayor to execute the Agreement between SRP and the City of Tempe in order to properly secure the regional public safety communications facility.

ADDITIONAL INFO: SRP is giving consent to the City of Tempe to encroach upon an existing power-line easement property located on City property at the Papago Butte Water Treatment tank site. The easement is required for the placement of fencing and related improvements for a communications facility. The communications structure itself shall not be installed within the easement property.

**When Recorded Return To:
Don Handke – SRP Job #14299
Property Management - PAB348
P. O. Box 52025
Phoenix, Arizona 85072-2025**

**CONSENT TO USE OF EASEMENT AGREEMENT
PAPAGO BUTTE WATER TREATMENT RADIO SITE
C2008-__**

This Consent to Use of Easement Agreement (“Agreement”) is made and entered into as of the 8th day of February, 2008, by and between **SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT**, an agricultural improvement district organized and existing under the laws of the State of Arizona (“SRP”), and the **CITY OF TEMPE**, an Arizona municipal corporation (“Owner”).

RECITALS

1. Owner is the legal owner of certain real property (“Owner’s Parcel”) located in Section 10, of Township 1 North, Range 4 East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona.
2. SRP has an existing easement (“Easement”) for (in part) existing and future electrical facilities over a portion of Owner’s Parcel which was conveyed to SRP in instrument number 86-504894 on September 18, 1986 in the official records of Maricopa County, Arizona. The portion of Owner’s Parcel encumbered by the Easement shall be referred to as the “Easement Property”.
3. Owner wishes to occupy and use certain areas of the Easement Property in a manner potentially inconsistent with or explicitly prohibited by the terms of the Easement.
4. SRP is willing to consent to Owner’s proposed occupancy and use of certain areas within the Easement Property upon the terms and conditions set forth in this Agreement.
5. It is the intent of Owner and SRP to record this Agreement and to bind future owners of the Easement Property to its terms and conditions.

AGREEMENT

In consideration of the mutual promises, undertakings, agreements, and other terms and conditions herein, the adequacy of which is hereby acknowledged by each party, the parties agree as follows:

1. SRP CONSENT TO USE OF EASEMENT PROPERTY.
 - 1.1 SRP consents to the occupancy and use of the Easement Property for equipment, fencing and related improvements for a radio tower (“Owner’s Improvements”), as

such were presented and described in final plans dated September 5, 2007. The radio tower shall not be installed within the Easement Property.

- 1.2 SRP shall retain all rights granted to it by the terms of the Easement, and this Agreement shall in no way diminish any of those rights. SRP's rights include, in part, the right to install, access, maintain, reconstruct, replace, remove, operate and use: a line or lines of poles, towers, or other supporting structures; conductors, cables, communication and signal lines; guys, anchorages, braces, transformers, vaults, manholes, and pad-mounted equipment; underground conduits, conductors, pipes, and cables; and other appliances, appurtenances, and fixtures associated with the transmission and distribution of electricity and communication signals and other related purposes at such locations and elevations over, across, under, and upon the Easement Property or any part thereof as SRP may now or hereafter deem convenient or necessary.

2. CONDITIONS OF OWNER'S USE.

- 2.1 Other than Owner's Improvements specifically consented to herein, Owner shall make no additional installations or improvements (or change the location of its installations or improvements) within or upon the Easement Property without first having received written approval from SRP's Land Department of drawings and narrative showing the details and location of any and all such installations or improvements, which approval shall not be unreasonably withheld.
- 2.2 Any and all of Owner's Improvements shall be located and constructed so as not to interfere with SRP's use of or access to the SRP facilities located within the Easement Property. Furthermore, any and all of Owner's below-ground facilities located within the Easement Property shall be designed and constructed to allow SRP's heavy equipment to be driven and set up over any and all of the Easement Property without damage to Owner's below-ground facilities. SRP requires that Owner's below-ground facilities be designed to withstand a minimum loading of 320 pounds per square inch (PSI) applied to the ground surface under a crane outrigger pad measuring 27 inches in diameter.
- 2.3 Owner, at its sole cost, shall at all times maintain proper clearances between SRP's energized electrical facilities and Owner's Improvements, personnel and equipment as required by the National Electrical Safety Code (NESC), Arizona law, Federal law (OSHA), and all other applicable rules, codes or regulations.
- 2.4 Owner acknowledges that it is aware of and understands the potential problems associated with the installation, use, and maintenance of Owner's Improvements near SRP's electric facilities, including, but not limited to, potential problems related to induced and/or transferred voltages and/or currents. Owner agrees and represents that it (and not SRP) shall be fully responsible for the effective mitigation of all such problems. Additionally, SRP reserves its rights under the Easement to modify existing, or construct future, electrical facilities, and SRP shall not be responsible for

the effectiveness of Owner's mitigation system or for its continued effectiveness if and when SRP exercises such rights.

- 2.5 Any and all above-ground metal installed by Owner that is accessible to the public shall be properly grounded and coated with an effective insulating material. Owner shall periodically inspect and maintain said grounding and insulation.

3. RELOCATION OF OWNER'S IMPROVEMENTS.

- 3.1 Owner, at its cost, agrees to relocate, modify, or remove any of Owner's Improvements that, in SRP's sole discretion, unreasonably interfere with SRP's ability to use the Easement Property for the purposes described in the Easement. In such event, SRP shall provide written notification to Owner, and Owner shall respond promptly and exercise due diligence to complete such relocation, modification, or removal work within the time specified by SRP in its written notification. SRP will not arbitrarily or capriciously require relocation, modification, or removal by Owner.
- 3.2 In the event of an emergency or other situation in which the above written notification is not practical, SRP may relocate, modify, or remove any of Owner's Improvements that, in SRP's sole discretion, unreasonably interfere with SRP's ability to use the Easement Property for the purposes described in the Easement. SRP will not arbitrarily or capriciously relocate, modify, or remove Owner's Improvements.
- 3.3 SRP shall retain the right, but not the obligation, to trim, cut, and clear away any trees, bushes, cacti, or other landscaping without prior written notification, whenever necessary (in SRP's reasonable discretion) for the convenient and safe exercise of its rights granted by the Easement.

4. INDEMNIFICATION AND RELEASE.

- 4.1 To the fullest extent not prohibited by law, Owner shall indemnify, defend, release, and hold harmless SRP, members of its governing bodies, and its employees ("SRP Indemnified Parties") for, from and against any claim, demand, lawsuit, or action of any kind for damages or loss (whether such damage or loss is to person or property) or any losses, damages, expenses, and liabilities for damages to property or injury or death of any person, including but not limited to property or personnel of SRP and Owner, arising in whole or in part out of: (a) negligent, grossly negligent, or intentional acts or omissions of Owner, its agents, contractors, officers, directors, members, or employees ("Owner Indemnifying Parties"); (b) the Owner Indemnifying Parties' use or occupancy of the Easement Property as contemplated by this Agreement, including but not limited to claims by third parties who are invited or permitted onto the Easement Property, either expressly or impliedly, by Owner or by the nature of the Owner's Improvements; or (c) Owner's failure to comply with or fulfill its obligations established by this Agreement or by law. The obligation to indemnify shall extend to and encompass all costs incurred by the SRP Indemnified Parties in defending against claims, demands,

lawsuits or actions, including but not limited to attorneys' and expert fees. Owner's obligation under this Section 4.1 shall not extend to claims, demands, lawsuits, or actions for liability caused by the negligence of the SRP Indemnified Parties.

4.2 Owner expressly agrees that SRP shall not be responsible for any damage to Owner's Improvements that SRP may cause while exercising its rights granted by the Easement. SRP shall use reasonable care to avoid or minimize such damage.

4.3 The provisions of Sections 4.1 and 4.2 shall survive termination of this Agreement.

5. GENERAL TERMS AND CONDITIONS

5.1 SRP may revoke this Agreement upon Owner's failure to comply with its obligations hereunder. Prior to revocation, SRP shall provide Owner with prior written notice of default and a reasonable opportunity to cure.

5.2 The covenants and agreements in this Agreement shall run with and burden the land and shall extend and inure in favor and to the benefit of, and shall be binding on, Owner and SRP and their respective successors (including successors in ownership and estate), assigns, and lessees.

5.3 This Agreement (including Owner's final plans referred to in Section 1.1) constitutes the entire agreement between the parties about Owner's Improvements and Owner's use of the Easement Property, and no understandings or obligations not expressly stated or referenced in this Agreement shall be binding. No verbal agreements or conversations with any officer, agent, or employee of either party shall affect or modify any of the terms or obligations in this Agreement.

5.4 This Agreement may not be modified or any provision waived except by written agreement executed by both SRP and Owner. The waiver by either party of any breach or failure to provide full performance under any of the terms and conditions of this Agreement, or the failure of a party to exercise, or any delay in exercising, any rights or remedies provided herein or by law, or the failure of a party to notify the other properly in the event of a breach hereunder shall not be construed as a waiver of any other term or condition herein, or of any subsequent or continuing breach of the same or any other term or condition.

5.5 Nothing in this Agreement is intended or shall be construed to confer upon or give any person or entity other than SRP and Owner (and their respective successors, assigns, and lessees) any right, remedy or claim under or by reason of this Agreement. All the terms, covenants and conditions of this Agreement shall be for the sole and exclusive benefit of SRP and Owner (and their respective successors, assigns, and lessees).

OWNER:

CITY OF TEMPE, a municipal corporation

By: _____

Its: Mayor

Attest:

By: _____
City Clerk

Approved as to Form:

By: _____
City Attorney